Chee Hua Import & Export Sdn Bhd & Anor v Ching Tah Realty Sdn Bhd & Anor

HIGH COURT (KUCHING) — CIVIL SUIT NO 22–54 OF 2006–III
DAVID WONG J
5 SEPTEMBER 2008

Contract — Agreement — Sale and purchase — Revocation of agreement — Whether it was implied term of revocation deeds that deposit paid would not be forfeited by plaintiffs — Whether there were collateral agreements between parties in consideration of plaintiffs executing revocation deeds — Whether upholding plaintiffs' contention would amount to breach of ss 91 and 92 of the Evidence Act 1950

Contract — Illegality — Contravention of law — Whether by their conduct defendants had impliedly withdrawn their allegations of illegality

The first defendant owned a four storey shop house situated at Simpany Tiga, Tabuan, Kuching ('the shop house at Lot 7837'). Sometime in October 2005, Thian Jun Hin, the director of the first defendant ('Thian') approached the first plaintiff to inform him that the shop house at Lot 7837 was for sale. On 13 October 2005, the first plaintiff entered into a sale and purchase agreement to purchase the shop house at Lot 7837 for RM720,000. The second plaintiff entered into a sale and purchase agreement with the second defendant, the sole proprietor of the King's Centre Food Court, to purchase the business operating as a coffee shop at Simpang Tiga ('business at Lot 7836'). The consideration for the sale and purchase of the business was RM250,000. The plaintiffs and defendants had an existing business and tenancy agreement for the ground floor of the premises at Lot 7836. Thereafter the defendants alleged that the plaintiffs had defaulted in their payments under the two sales and purchase agreements and hence all the parties agreed to terminate their relationship by entering into two revocation deeds. The first revocation deed sought to cancel the sale and purchase agreement in respect of the shop house at Lot 7837 and the second revocation deed sought to cancel the sale of the business at Lot 7836. However, according to a director of the plaintiffs, the parties had agreed to cancel the two existing sale and purchase agreements between the parties by way of two deeds of revocation because the parties wished to sign a new tenancy agreement for the ground floors of Lots 7836 and 7837. Under the revocation deeds the plaintiffs agreed, inter alia, that they forfeited the

deposit sums of RM20,000, in respect of the sale and purchase of the shop house, and RM30,000 in respect of the sale and purchase of the business; and that the parties to the agreements were released from all the terms and conditions of the sale and purchase agreements. It was the plaintiffs' claim that they only entered into the revocation deeds because Thian had orally represented that in consideration of the plaintiffs executing the two revocation deeds the defendants would enter into a new sale and purchase agreement for the sale of the business and a new tenancy agreement for Lots 7836 and 7837 and that the deposits paid by the plaintiffs would be used as payments in the new sales and purchase agreements and the tenancy agreement. In this application to the court the plaintiffs were claiming the repayment of RM243,000 (RM263,000 less the deposit of RM20,000) that they had paid under the sale and purchase agreement for the purchase of the shop house at Lot 7837 and the deposit sum of RM20,000 paid as damages incurred from the total failure of consideration of the collateral agreement; and the repayment of RM40,000 (RM70,000 less the deposit of RM30,000) that they had paid under the sale and purchase agreement for the purchase of the business and the deposit sum of RM30,000 paid as damages incurred from the total failure of consideration of the collateral agreement. At the beginning of the trial the defendants applied to strike out the plaintiffs' claims on the grounds of illegality. The plaintiffs adduced evidence of payments in the form of cheques and payment vouchers and had accounted for having paid the first defendant a sum of RM257,000 in respect of the shop house. Although the payment of the RM70,000 for the sale and purchase of the business was admitted by the defendants in their amended defence, they disputed the payment of RM257,000 and alleged that the cheque payments were for other purposes and not for the purchase of the shop house. The defendants also submitted that if the plaintiffs' contention were upheld it would amount to a breach of ss 91 and 92 of the Evidence Act 1950('the Act'). The defendants also counterclaimed for arrears of rental, costs of repair and renovation and for unpaid bills and electricity.

Held, allowing the plaintiffs' claim and the defendants' counterclaim:

(1) The defence had not led any evidence of illegality. Although the defence witnesses had every chance to raise illegality they had not testified that they were parties to the illegal act of defrauding the Inland Revenue Department. Therefore, by their conduct the defendants had impliedly withdrawn their application to strike out the plaintiffs' claims on the grounds of illegality (see para 3).

(2) Having heard the evidence of the witnesses and read the submissions of the parties the court had decided that the evidence of the plaintiffs was more credible. If the plaintiffs had defaulted in their obligations under

the sale and purchase agreements as alleged by the defendants, there would be no necessity for the two revocation deeds. The defendants would have been entitled to terminate the agreements and forfeit the amount paid by the plaintiffs. There was also evidence by an independent witness to corroborate the plaintiffs' evidence of the circumstances in which the two deeds of revocation were signed (see para 11).

(3) There were no merits in the defendants' submission that upholding the plaintiffs' contention would breach ss 91 and 92 of the Act. In fact the evidence adduced by the plaintiffs did not contradict the terms of the two deeds of revocation but enlightens the court as to the circumstances in which the two deeds were signed. In any event it concerned collateral agreements which do not impinge on the two deeds (see para 13).

(4) It is trite law that for any claim to be sustained, one must produce adequate evidence. The plaintiffs in this case had, except for a cash payment of RM6,400, produced in court proof of such payments. As such they had established a prima facie case that they have paid the first defendant a sum of RM257,000. The defendants' allegations that the payments were for purposes other than the purchase price of the shop house were bare allegations and they were suspect (see para 14).

(5) The second defendant's counterclaim for unpaid bills and electricity amounting to RM6,582.36 was admitted and allowed. The first defendant in his counterclaim for renovation costs amounting to RM46,171.04 relied on a summary of its claims which was no proof at all. In order to sustain this claim the first defendant should have called the person who did the renovation work to testify to the renovation cost. As such this claim and the claim for arrears of rental which was also unsubstantiated must fail (see paras 21–22).

[Bahasa Malaysia summary

Defendan pertama memiliki sebuah rumah kedai empat tingkat yang terletak di Simpang Tiga, Tabuan, Kuching ('rumah kedai di Lot 7837'). Sekitar Oktober 2005, Thian Jun Hin, pengarah kepada defendan pertama ('Thian') cuba mempengaruhi plaintif pertama untuk memberitahunya bahawa rumah kedai di Lot 7837 adalah untuk dijual. Pada 13 Oktober 2005, plaintif pertama telah memasuki satu perjanjian jual beli untuk membeli rumah kedai di Lot 7837 pada harga RM720,000. Plaintif kedua telah memasuki satu perjanjian jual beli dengan defendan kedua, pemilik tunggal King's Centre Food Court, untuk membeli perniagaan yang beroperasi sebagai kedai kopi di Simpang Tiga ('perniagaan di Lot 7836'). Balasan bagi jual beli perniagaan tersebut adalah RM250,000. Plaintif-plaintif dan defendan-defendan mempunyai perniagaan sedia ada dan perjanjian penyewaan bagi tingkat

bawah premis di Lot 7836. Kemudiannya, defendan-defendan mendakwa bahawa plaintif-plaintif telah mungkir di dalam pembayaran mereka di bawah dua perjanjian jual beli dan oleh itu kesemua pihak bersetuju untuk menamatkan hubungan mereka dengan memasuki dua surat ikatan pembatalan. Surat ikatan pembatalan yang pertama adalah untuk membatalkan perjanjian jual beli berkenaan dengan rumah kedai di Lot 7837 dan surat ikatan pembatalan yang kedua adalah untuk membatalkan penjualan perniagaan di Lot 7836. Walau bagaimanapun, menurut seorang pengarah plaintif-plaintif, pihak-pihak telah bersetuju untuk membatalkan dua perjanjian jual beli yang sedia ada di antara pihak-pihak melalui dua surat ikatan pembatalan kerana pihak-pihak berhasrat untuk menandatangani satu perjanjian penyewaan yang baru bagi tingkat bawah Lot 7836 dan 7837. Di bawah surat ikatan pembatalan plaintif-plaintif telah bersetuju, antara lain, bahawa mereka merampas deposit sebanyak RM20,000 bagi jual beli rumah kedai dan RM30,000 bagi jual beli perniagaan, dan oleh itu pihak-pihak kepada perjanjian-perjanjian tersebut dilepaskan daripada kesemua terma-terma dan syarat-syarat perjanjian-perjanjian jual beli tersebut. Adalah tuntutan plaintif bahawa mereka hanya memasuki surat ikatan pembatalan kerana Thian telah mangatakan secara lisan bahawa balasan untuk plaintif-plaintif bagi melaksanakan dua surat ikatan pembatalan, defendan-defendan perlu memasuki satu perjanjian jual beli yang baru untuk penjualan perniagaan dan satu perjanjian penyewaan untuk Lot 7836 dan 7837 dan deposit yang telah dibayar oleh plaintif akan digunakan sebagai pembayaran di dalam perjanjian jual beli dan perjanjian penyewaan yang baru. Di dalam permohonan ini kepada mahkamah plaintif-plaintif menuntut bayaran balik sejumlah RM243,000 (RM263,000 dipotong deposit sebanyak RM20,000) bahawa mereka telah bayar di bawah perjanjian jual beli bagi membeli rumah kedai di Lot 7837 dan jumlah deposit sejumlah RM20,000 telah dibayar sebagai ganti rugi yang ditanggung daripada kegagalan balasan perjanjian kolateral; dan bayaran balik sejumlah RM40,000 (RM70,000 dipotong deposit sebanyak RM30,000) bahawa mereka telah bayar di bawah perjanjian jual beli bagi pembelian perniagaan dan jumlah deposit sebanyak RM30,000 yang telah dibayar sebagai ganti rugi yang ditanggung daripada kegagalam balasan perjanjian kolateral. Pada permulaan perbicaraan, defendan-defendan memohon untuk membatalkan tuntutan plaintif-plaintif atas alasan kepenyalahan undang-undang. Plaintif-plaintif telah mengemukakan keterangan pembayaran-pembayaran dalam bentuk cek dan baucar pembayaran dan telah memperhitungkan bagi pembayaran yang dibuat kepada defendan pertama sejumlah RM257,000 berkenaan dengan rumah kedai. Walaupun pembayaran RM70,000 bagi jual beli perniagaan telah diakui oleh defendan-defendan di dalam pembelaan terpinda mereka, mereka mempertikaikan pembayaran RM257,000 dan mendakwa bahawa pembayaran cek adalah untuk tujuan yang lain dan bukan untuk pembelian rumah kedai. Defendan-defendan juga menghujahkan bahawa jika pengataan plaintif-plaintif diterima ia menyebabkan

kemungkiran ss 91 dan 92 Akta Keterangan 1950 ('Akta'). Defendan-defendan juga menuntut balas bagi sewa tertunggak, kos pembaikan dan pengubahsuaian dan untuk bil-bil elektrik yang tidak berbayar.

Diputuskan, membenarkan tuntutan plaintif-plaintif dan tuntutan balas defendan-defendan:

(1) Pembelaan tidak menunjukkan apa-apa keterangan berkenaan dengan kepenyalahan undang-undang. Walaupun saksi-saksi pembelaan mempunyai setiap peluang untuk membangkitkan kepenyalahan undang-undang, mereka tidak memberikan keterangan bahawa mereka adalah pihak-pihak kepada tindakan penyalahan undang-undang menipu Jabatan Lembaga Hasil. Oleh itu, melalui tindakan mereka, defendan-defendan secara tersiratnya menarik balik permohonan mereka untuk membatalkan tuntutan plaintif atas alasan kepenyalahan undang-undang (lihat perenggan 3).

(2) Mendengar keterangan saksi-saksi dan membaca hujahan pihak-pihak, mahkamah memutuskan bahawa keterangan plaintif adalah lebih dipercayai. Jika plaintif-plaintif telah memungkiri kewajipan mereka di bawah perjanjian-perjanjian jual beli seperti yang didakwa oleh defendan-defendan, tidak terdapat keperluan bagi dua surat ikatan pembatalan. Defendan-defendan adalah berhak untuk menamatkan perjanjian-perjanjian tersebut dan merampas sejumlah yang telah dibayar oleh plaintif-plaintif. Terdapat juga keterangan oleh saksi bebas untuk menyokong keterangan plaintif berkenaan dengan keadaan di mana dua surat ikatan pembatalan ditandatangani (lihat perenggan 11).

(3) Tidak terdapat merit di dalam hujahan defendan-defendan dengan mengesahkan hujahan plaintif-plaintif akan melanggar ss 91 dan 92 Akta. Sungguhpun keterangan yang dikemukakan oleh plaintif-plaintif tidak bertentangan dengan terma-terma dua surat ikatan pembatalan tetapi menyedarkan mahkamah berkenaan dengan keadaan di mana dua surat ikatan ditandatangani. Dalam apa jua keadaan ia berkenaan dengan perjanjian kolateral yang tidak mempengaruhi dua surat ikatan tersebut (lihat perenggan 13).

(4) Adalah undang-undang yang mantap bahawa bagi apa-apa tuntutan untuk bertahan, seseorang perlu mengemukakan keterangan yang mencukupi. Plaintif-plaintif dalam kes ini telah mengemukakan keterangan yang mencukupi, kecuali bayaran tunai sejumlah RM6,400 dikemukakan di mahkamah bukti bayaran-bayaran tersebut. Oleh itu mereka telah membuktikan kes prima facie bahawa mereka telah membayar defendan pertama sejumlah RM257,000. Dakwaan

defendan-defendan bahawa pembayaran-pembayaran adalah bertujuan selain daripada harga belian rumah kedai adalah dakwaan kosong dan adalah dicurigai (lihat perenggan 14).

(5) Tuntutan balas defendan kedua untuk bil-bil dan elektrik tidak berbayar yang berjumlah RM6,582.36 adalah diterima dan dibenarkan. Defendan pertama di dalam tuntutan balasnya untuk kos pengubahsuaian yang berjumlah RM46,171.04 yang bergantung kepada tuntutannya yang ringkas langsung tidak mempunyai bukti. Untuk mengekalkan tuntutannya defendan pertama mestilah memanggil orang yang membuat kerja pengubahsuaian untuk memberikan keterangan berkenaan dengan kos pengubahsuaian. Oleh itu tuntutan ini dan tuntutan untuk sewa tertunggak yang tidak berasas mestilah gagal (lihat perenggan 21–22).]

Notes

For cases on agreement generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2422–2432.

For cases on contravention of law, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4125–4141.

Cases referred to

Abrath v North Eastern Railway Co (1883) 11 QBD 440 (folld)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 35, CA (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

Rules of the High Court 1980 O 27 r 4(1)

Jonathan Chong (TC Chong & Co) for the plaintiffs.

See Chee How (Cheng & Cheng) for the defendants.

David Wong J:

INTRODUCTION

[1] This case concerns two revocation deeds. The first deed (pp 18–19 of exh A) is a revocation deed entered between the first plaintiff and the first defendant which revoked a sale and purchase agreement of a four storey shop house situate at Simpang Tiga, Tabuan, Kuching dated 13 October 2005. In this deed there is a provision which states that the sum of RM20,000, which is the deposit, is forfeited to the first defendant with no provision as to the other payments made by the first plaintiff. According to the first plaintiff, it had paid a total sum of RM263,400 and now is claiming for the repayment of RM243,400 (RM263,400 less RM20,000). As for the deposit sum of

RM20,000, the first plaintiff is claiming it back under the head of damages incurred from the total failure of consideration of the collateral agreement. The consideration for the sale and purchase of the four storey shop house was stated to be RM720,000.

[2] The second deed (exh P2) is a revocation deed entered between the second plaintiff and second defendant which revoked a sale and purchase agreement of a business operating a coffee shop at Simpang Tiga as well. In this deed there is also a provision which states that the sum of RM30,000 (which is the deposit paid) is forfeited to the second defendant with no provision as to the other payments made by the second plaintiff. According to the second plaintiff, a sum of RM70,000 had been paid and it is now claiming for the repayment of RM40,000 (RM70,000 less RM30,000). As for the deposit sum of RM30,000 the second plaintiff is claiming it back under the head of damages incurred from the total failure of consideration of the collateral agreement. The consideration for the sale and purchase of the business was stated to be RM250,000.

ISSUES

(1) *Whether the plaintiffs' claims should be struck out on the ground of illegality?*

[3] From the outset of the submission, Mr Cheng Hui Hong (Mr Cheng), counsel for the defendants, requested me to make a ruling on the application set out in encl 82 which in effect is an application to strike out the plaintiffs' claims on the ground of illegality. Mr Cheng was not counsel for the defendants when this matter was called for trial on the 25 September 2006. Mr See Chee How (Mr See) was the then counsel and he filed in encl 82 when I fixed the case for trial. At that point of time, I informed Mr See that I would not hear encl 82 and he is at liberty to lead evidence alleged in encl 82 during the trial. Having looked at the evidence adduced by the defendants, I agree with counsel for the plaintiffs, Mr Jonathan Chong (Mr Chong), that the defendants had not led any evidence of illegality. They had every chance to do so when Thian Kai Foo (DW3), who is the second defendant and also the sole proprietor of the King's Center Food Court, and Thian Jun Hin (DW4) — Director of the first defendant and was until his resignation on 26 April 2006; a director of the first and second plaintiff, testified in court. In fact DW3 and DW4 in their witness statements confirmed that the considerations are as stated in both the agreements. Nowhere in their statements did they say that they were parties to the illegal act of defrauding the Inland Revenue Department. By their conducts, I take it that the defendants had impliedly withdrew encl 82 and I accordingly dismissed it.

[4] In any event the claims by the plaintiffs do not rely on the two agreements. Their cause of action is based on the two deeds of revocation and two collateral agreements.

(2)(a) *Whether there is an implied term in the first and second deed that the defendants are required to refund the amount paid less the deposits paid?*

(b) *Whether there were two collateral agreements between the plaintiffs and defendants where the defendants through Mr Thian Jun Hin orally promised, in consideration of the plaintiffs' executing the two deeds of revocation, to enter a new sale and purchase agreement for the sale of the business and a new tenancy agreement for Lots 7836 and 7837 and that the deposits stated in the two deeds are to be used as payments provided for in the new sales and purchase agreement and tenancy?*

[5] The first deed contains the following terms:

(1) Upon the execution of this Deed, the said Agreement is and is hereby cancelled and revoked by both parties hereto by mutual consent with immediately effect.

(2) The deposit sum of Ringgit Malaysia Twenty Thousand Only (RM20,000.00) is hereby forfeited by the Vendor.

(3) That upon the cancellation and revocation of the said Agreement neither party shall have any claim whatsoever against the other party, and that either party hereby releases the other party from all the terms, conditions and stipulations and covenants of the said Agreement.

[6] The second deed (exh P2) contains the following terms:

(1) Upon the execution of this deed, the said agreement is and is hereby cancelled and revoked by both parties hereto by mutual consent with immediately effect

(2) The deposit sum of Ringgit Malaysia Thirty Thousand Only (RM30,000.00) is hereby forfeited by the Vendor.

(3) That upon the cancellation and revocation of the said Agreement neither party shall have any claim whatsoever against the other party, and that either party hereby releases the other party from all the terms, conditions and stipulations and covenants of the said Agreement.

THE DEFENDANTS' CONTENTION

[7] Mr Cheng's submission is simply this. Clause 3 of both deeds stipulates that 'neither party shall have any claim whatsoever against the other party' and this implies that whatever had been paid by the plaintiffs under the two agreements are also forfeited.

[8] Whether Mr Cheng's contention can be sustained depends on the circumstances in which the two deeds were executed. There are basically two sets of allegations before me. The defendants contended that the plaintiffs had defaulted in their payments under the two agreements and hence all the parties agreed to terminate their relationship by entering into the two deeds and all payments made by the plaintiffs would be forfeited.

THE PLAINTIFFS' CONTENTION

[9] The plaintiffs contended that in early 2006 the relationship between the parties had soured and to resolve this predicament, the plaintiffs and the defendants had agreed to cancel the two agreements by way of two deeds of revocations with the conditions that the plaintiffs and the defendants will sign a new agreement for taking over the business and a tenancy agreement for the ground floors of Lot 7836 and Lot 7837. This is how Lioa Qiyuan ('PW1') and a director of the plaintiffs put it:

> 21. When we were at Messrs Loming & Co Advocates, Mr Chan told me that the documents we are going to sign are to cancel the sale of the shop and sign some new agreement for the taking over of the business and to sign new tenancy agreement.
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> 22. I asked Mr Chan about the money we had paid for the shop. He said of course it would be refunded as the DR only states that the deposit would be forfeited. I asked him why the deposit should be forfeited when Thian Jun Hin had agreed to refund all money paid. He said it is common practice that the D/R says the deposit to be forfeited. He said that is to make the DR valid. So I asked Thian Jun Hin how he wanted to deal with this. He said there is no problem with the balance as the DR only says the deposit only to be forfeited. He said if the problem is the deposit, then he would make it up and he would in return not ask for the security deposit for the new tenancy agreement for the ground floors of sublots 19–20. Anything left after that it would be used to contra rental. That way it would be just like all the monies we had paid are refunded. He said that way it is just like the deposit is used as the security deposit for the new tenancy agreement and to pay rent there. He said the same for the sale & purchase agreement for the business. He said he did not want the DR to be changed anymore. He

said in return of us signing the DR as it is, he would not ask for the RM30,000 under the new agreement for the business. The RM40,000 balance could be refunded under the DR.

THE LAW

[10] In performing the task of determining which story is more credible, I take heed of what was stated in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 35 by Gopal Sri Ram JCA:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
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> In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, the trial judge had found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant and its witnesses. On appeal, the Federal Court reversed his finding of fraud. Chang Min Tat FJ said:
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> > Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* Plausibility should never be mistaken for veracity.
> >
> > (Emphasis added.)

In *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, the trial judge accepted the evidence of certain witnesses because they had remained unshaken in cross examination. Based on that evidence he convicted the appellant. The Federal Court reversed. Ong Hock Thye FJ said:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. *The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.*
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> (Emphasis added.)

FINDINGS OF THE COURT

[11] Having heard the evidence of the witnesses and read the submissions of counsels I find the evidence of the plaintiffs to be more credible and my reasons are these:

(1) If the plaintiffs had in fact defaulted in their obligations in paying the defendants as alleged there would not be any necessity for the two deeds of revocations. The defendants would be entitled to terminate the agreements and forfeit the amount paid by the plaintiffs.

(2) DW4's testimony in court is suspect. I say that for the simple reason that he was not fully aware of the terms of the sale and purchase agreement of the shoplot. In the examination-in-chief he had testified that the agreement provided for a monthly installment of RM20,000 but when questioned in cross examination he was unable to point out to the court where it is provided in the agreement. DW4's demeanor when testifying on this point was not impressive at all.

(3) DW4 also did not explain why there was in existence a new tenancy and a sale and purchase agreement of the business. Such evidence (PW4-A) was tendered through Chan Chiaw Boon (PW4).

(4) PW4, in my view, is an independent witness who had corroborated the evidences of PW1 and PW3 (Lee Jun Chung) in so far as the circumstance in which the two deeds of revocations were signed. His evidence was straightforward and this can be seen from his witness statement:

> 2 Sometime in October 2005, Thian Jun Hin came to see me in my office. He said he wanted to sell one of his shops at King Centre and the food court business. The shop is owned by D1 and Thian Jun Hin is a director of D1. The food court call KCFC is registered under his son, D2 name. I have known Thian Jun Hin personally and as a friend for many years.

From this instruction, our firm prepared the documents:

Sale and Purchase Agreement for Lot 7837 Block 64 Kuching Town Land District at King Centre (Block C) Kuching (sublot 20) This agreement was later dated 13th October 2005.

Sale and Purchase Agreement for sale of food court business called King Centre Food Court (KCFC). This agreement is also dated 13 October 2005.

Tenancy Agreement for shoplot known as Lot 7836 Block 64 Kuching Town Land District (sublot 19). This TA was dated 13th October 2005 as well.

Witness shown PP1 – 17 of Exhibit A and confirmed to this Thian Jun Hin told me he in fact had already collected RM20,000.00 as deposit for the sale of shop lot No. 7837 and RM30,000.00 for the KCFC business. All the documents prepared were signed and dated 13.10.2005.

Later sometime in March 2006, Thian Jun Hin came to see me again in my office. He said he wanted to refund the purchase money for the shop lot to P1 and cancel the sale. He said he wanted to take back the shop and cancel the Sale and Purchase Agreement for the shoplot. He said but the food court business if they want it they (Plaintiff & P2) could continue to take over and they can rent the ground floor of the shoplots and carry on the food court business. Thian Jun Hin was not sure whether they (P) wanted to take over the food court. But he told me to get ready all the documents and he wanted to cancel the sale of shoplot.

I thought it would be easier to cancel or get rid of all the earlier agreements and at the same time enter new ones for the new arrangement

I then prepare the documents:

D/R to cancel the Sale and Purchase Agreement for sale of Lot 7837 D/R to cancel the sale of business and a new Sale and Purchase Agreement.

D/R to cancel the then tenancy for Lot 7836 and a new tenancy to cover both Lot 7836 and Lot 7837.

Witness shown PP18–23 of Exhibit A and Exh P2 and confirmed to this The D/R were based on another file previously done by our firm and had since been used many times. It is sort of our firm's standard form for revoking or canceling agreement. In all these previous files, the deposits stated are forfeited.

I did not go to change the clause on deposit because that is a standard clause and I thought without it the document is not be valid. I thought we needed the deposit to be forfeited as consideration to make it valid. I told Thian Jun Hin about this. I told him that is the law and it has to be stated that way even he had agreed to refund all the money. He wanted the DR to be signed as soon as possible and asked me to go

ahead with it. I told him that if I do that it would be implied only that the balance only would be refunded and that I am not sure the parties (p) would sign. He said on the refund, they would sort it out amongst themselves. He said he would tell the Plaintiff he would make it up to in another way. He said he would not collect the security deposit from them for the new tenancy agreement to be signed. After that he would not collect rental from them until the RM20,000.00 is set of. The same for the Sale and Purchase Agreement for KCFC. Thian Jun Hin said to compensate what the DR stated about the deposit being forfeited they would not asked for the RM30,000 deposit under the new agreement to be signed.

On the day of signing the new documents, Thian Jun Hin's daughter, Thian Yann came with him. She is one of the directors of D1. Thian Jun Hin asked her to sign the documents first and she left after that before the other signatories signed.

In a logical sequence in my mind, I thought I would let the signatories sign all the Deed of Revocation first and after revoking all the previous agreements, then let the parties entered into the new SPA for sale of business and new Tenancy Agreement for Lot 7836 and 7837.

The signatories for the 1st defendant, ie Mr. Thian and his daughter, then signed the Deed of Revocation to revoke the SPA for sale of Lot 7837 and Deed of Revocation revoking the Tenancy Agreement for Lot 7836. The Deed of Revocation for SPA for sale of business was not signed as the signatory, the 2nd Defendant, was not present then.

Immediately after signing the 2 Deed of Revocation in paragraph 0, Mr Thian Jun Hin to said he was late for some appointment and he have to leave and could not sign the new Tenancy Agreement for Lot 7836 and 7837 anymore. Although I told him that it should not take more then another 5 minutes to complete signing the new TA for lot 7836 and 7837 since all the signatories were already present, he left without signing them. Mr Thian at no time gave any indication that he was in a hurry or was due for any appointment before the plaintiff signatories signed the Deed of Revocation.

Mr Thian came back the following day to pay for our legal fee only for the 2 executed Deed of Revocation. He did not pay for the fee for the new SPA for sale of business and the new TA for lot 7836 and 7837 and asked the 2 executed Deed of Revocation to be sent for stamping. He also took the Deed of Revocation for sale of business and the new SPA for sale of business saying that he would send them to his son, the second defendant for signing in China.

After that I contacted Mr Thian a few times to come back to our office to sign the rest of the 2006 Agreements, he always answered that he needed time to sort out certain outstanding matters before signing the rest of the 2006 Agreements.

Furthermore Mr Cheng had not shown me why the evidence of PW4 should be ignored or treated with suspicion. He had nothing to gain from his testimony. In fact PW4 held himself as a good friend of DW4 who in his evidence did not contradict this assertion.

(5) It is not reasonable for the plaintiffs to sign the two deeds of revocation with the full knowledge that their payments made to the defendants would be fully forfeited. As stated earlier there was no reason for the two deeds if the plaintiffs had defaulted under the relevant agreements.

(6) I agree with Mr Chong that the law does not allow for forfeiture of such a large amount.

(7) If what is contended by the defendants are correct, why are only the sums of RM20,000 and RM30,000 mentioned in the two deeds? The full amount paid should be put into the two deeds so as to avoid any doubts.

(8) DW3's evidence is of no use to the court as he had testified that he had left everything to his father (DW4) to handle. His testimony on the presence of the police officers contradicts the defendants' version of the circumstances. This was how he recollected the event:

> Q: Refer to paragraph 5 (counsel reads paragraph 5). Who called the policemen?
>
> A: My first cousin.
>
> Q: If the second plaintiff wished to yield up the premises on its own accord, why is there a need to call the two policemen?
>
> A: It is the second plaintiff who requested the presence of the two policemen as witness to the handing over the keys by the second plaintiff to me.
>
> Put: That the two policemen were called because you and your first cousin were threatening to beat up the manager of the second plaintiff. Do you agree?
>
> A: I do not agree

Firstly here he gave two versions of the event. First he said that it was his first cousin who called the two policemen. Then later he said it was the second plaintiff who called the two policemen. As rightly pointed out by Mr Chong why should the plaintiffs call for the presence of the policemen if they had wanted to hand the keys back to him. In my view this witness had been cagey in his testimony.

[12] In summary, it is my finding that the parties' intentions are that whatever had been paid by the plaintiffs to the defendants should be repaid back to the plaintiffs except for the sum of RM50,000 which shall be used as a deposit amount for the new sale agreement of food court business and the new tenancy agreement for Lots 7836 and 7837.

[13] As for the contention by Mr Cheng that to uphold the plaintiffs' contention would breach ss 91 and 92 of the Evidence Act, I agree with Mr Chong that the evidence adduced by the plaintiffs do not contradict the terms of the two deeds of revocation. In fact they enlighten the court as to the circumstances in which the two deeds were signed and in any event it concerned collateral agreements which do not impinge on the two deeds.

THE PLAINTIFF'S CLAIMS

No	Date	Cheque	Amount	Exhibits
1.	On or around 6 October 2005	Cash	RM20,000	Exhibit A (pp 1–5)
2.	13 October 2005	875667	RM4,000	Exhibit P7
	13 October 2005	875668	RM30,000	Exhibit P8
3.	8 October 2005	875676	RM10,000	Exhibit P9
				Exhibit P10
4.	7 December 2005	Cash	RM10,000	Exhibit P11
				Exhibit P12
5.	19 December 2005	875695	RM5,000	Exhibit P13
				Exhibit P14
6.	11 January 2006	875700	RM14,000	Exhibit P15
7.	On or around 1 February 2006	Cash	RM6,400	
8.	7 February 2006	Cash	RM150,000	Exhibit P16
	7 February 2006	002452	RM10,000	Exhibit P17
	7 February 2006	002453	RM4,000	Exhibit P18
				Exhibit P19
	Total		RM263,400	

[14] It is trite law that for any claim to be sustained, one must produce adequate evidence. The plaintiffs in this case had, except for the payment of cash of RM6,400 — No 7 in the list of payment from first plaintiff to the first defendant, produced in court as proof in the form of cheques, payment vouchers and an acknowledgement of payment contained in the sale and purchase agreement. Hence on the face of the documents and at the end of the plaintiffs' case it is my view that they have established a prima facie case that they have paid the first defendant a sum of RM257,000 (RM263,400

less RM6,400). I have not allowed the claim of RM6,400 as unlike the other heads of claim there was no documentary evidence to support it.

[15] As for the payment of the RM70,000 for the sale and purchase of the business, it is admitted by the defendants in para 5(v) of the re-amended defense dated 10 July 2006.

[16] What I need to do now is to examine the contradictory evidence of the defendants and determine whether or not they had successfully neutralised the plaintiffs' evidence. My approach to the evaluation of the evidence is supported by the judgment of Brett MR in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 at p 452:

> But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer, if they are, they must find for the plaintiff; but if upon consideration of the fact, they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts, which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[17] In disputing the payments, the defendants are saying that whatever payments made via cheques were in fact for other purposes and not for the purchase of the shophouse. As for those cash payments supported by vouchers, the defendants are saying that when the vouchers were signed by DW4, no particulars were written on them.

[18] I shall deal first with the assertion of DW4 that the vouchers were signed without any particulars written thereon. Mr Chong submits that DW4's assertion cannot be made as the plaintiffs had disclosed in the plaintiffs' list of documents prior to trial and no notice was given by the defendants to the plaintiffs as required under O 27 r 4(1) (Rules of the High Court 1980) to dispute the authenticity of the payment vouchers. There is

some merit in this contention as counsel for the defendants had not given any explanation why the authenticity of the vouchers was not disputed. Be that as it may, even if I allow the allegation to be admitted, I find it to be a bare allegation. DW4 is not a nave businessman, in fact I find him to be an experienced one and it is my view that it is not reasonable for any businessman especially one like DW4 to sign any blank vouchers. PW1 and DW4 were not related in any way. They were only business partners and to say that DW4 had trusted PW1 and never doubted her integrity defies logic. Further as I have stated earlier, DW4 was not an impressive witness in so far as presenting his case to the court. In fact he was not sure of the defendants' case. He, even in his re-examination, could not explain his assertion that the first plaintiff is required under the sale and purchase agreement to pay a monthly installment of RM20,000 when it was pointed out to him that there was no such provision. This only shows that he was not conversant with his own case which explains why his presentation of evidence in court was inconsistent and cannot withstand reasonable scrutiny.

[19] As for the allegation that the payment by way cheques were for purposes other than for the purchase price of the shophouse, again I find it to be suspect. Ho Chiew Kheng (DW2) produced receipts showing the payments were made for other purposes. Mr Chong, on this aspect of the case, submits that the plaintiffs had made discovery and forwarded copies of the payment vouchers to the defendant's counsel well before the start of the trial on 25 September 2006 but when the defendants filed their the list of documents it did not contain such receipts. And it was only half way through the trial that the receipts were disclosed by way of a supplementary list of documents and copies filed as defendants' bundle of documents Vol IV. In view of that Mr Chong submitted that all the receipts were not contemporary issued when payments were made and did not exist until much later. From the court records, the defendants had filed on four occasions, namely 19 September 2006, 26 September 2006, 27 September 2006, and 16 January 2007, affidavits verifying list of documents and if plaintiffs' counsel had bothered to properly read the contents of the affidavit verifying supplementary list of documents (II) dated 27 September 2006, he would have noticed that the receipts had been disclosed as item 1, Part 1 of schedule 1. The reality here is that the plaintiffs' counsel had not bothered to inspect the documents disclosed. The consequence is that counsel had in fact misled the court and if the court had not bothered to check the veracity of the allegation, it would have made a decision based on falsehood. Counsel must understand that they are officers of the court and they are expected to assist and not mislead the court.

[20] Coming back to the worth of the receipts, I agree with Mr Chong's contention that the defendants had not explained why only one receipt book

was especially used for the plaintiffs. This fact raises doubt on the authenticity of the receipts. Further there was no evidence to show that copies of the receipts had been given to the plaintiffs which would be the natural thing to do.

THE DEFENDANTS' COUNTERCLAIMS

The first defendant's claims

(1)	Arrears of rental for the first floor of No 19-20, Block C, King Center, Kuching	RM7,120
(2)	Costs of repair and costs of renovation	RM46,171.04
(3)	Unpaid rental for ground floor of Lot 7836	RM 9,466.63
	Total:	RM62,757.67

The second defendant's claim

(1)	Unpaid bills and electricity	RM 6,582.36

[21] As for the claim of the second defendant, the second plaintiff has admitted to it. For the claims of RM9,466.43, the first plaintiff had admitted to it by attempting to pay the amount to the first defendant through Messrs Loming & Co Advocates, Kuching, which was rejected by the first defendant. However Mr Chong submits that the first defendant is now estopped from claiming for it. With respect that argument has no merit as the act of refusal to accept does not amount to waiver of payment.

[22] As for the claim of renovation of RM46,171.04, the first defendant relied on p 31 of exh A which merely contained a summary of the first defendant's claims. This is not proof at all. For the claims to sustain the first defendant must call the person who did the renovation work to testify to the renovation cost. Worse still there was no evidence from DW3 or DW4 as to what renovation was done. It is basic that whoever alleges and wants the court to give judgment to his claims must bear the burden of proof. Sadly in this matter the first defendant had failed badly.

[23] As for the claim of the arrears of rental for the first floor of No 19–20, Block C, King Center, Kuching, in the sum of RM7,120, again I see no proof offered by the first defendant.

ORDERS OF THE COURT

[24] For reasons stated I make the following orders.

[25] In respect of the plaintiffs:

(1) For the first plaintiff, judgment in the sum of RM237,000 as refund and RM20,000 as damages for the collateral agreement.

(2) For the second plaintiff, judgment in the sum of RM40,000 as refund and RM30,000 as damages for the collateral agreement.

(3) Statutory interests of 8% on the judgment sums from the date of judgment until the full payment of the judgment sums.

(4) Costs to be taxed unless agreed.

[26] In respect of the defendants:

(1) For the first defendant, judgment in the sum of RM9,466.63.

(2) For the second defendant, judgment in the sum of RM6,582.36.

(3) Statutory interests of 8% on the judgment sums from the date of judgment until the full payment of the judgment sums.

(4) Costs to be taxed unless agreed.

Plaintiff's claims allowed. Defendants' counterclaims allowed.

Reported by K Nesan